United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4083

In the

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-4083

W. J. USERY, JR., SECRETARY OF LABOR,
Petitioner,

vs.

MARQUETTE CEMENT MANUFACTURING CO.,
Respondent,

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Intervenor.

On Petition To Review An Order Of The Occupational Safety And Health Review Commission

BRIEF ON BEHALF OF RESPONDENT

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BRIEF ON BEHALF OF RESPONDENT

I. STATEMENT OF THE FACTS

The material facts are succinctly and exclusively stated in the stipulation of facts signed by Marquette Cement Mfg. Co. and the Secretary of Labor (Jt. App. pp. 15-19). This stipulation was in lieu of a hearing, not in preparation for a hearing, and both parties waived the presentations of any additional matter by their respective execu-

tions. Accordingly, arguments in support of inferences and attempts at embellishments are inappropriately made at this stage of proceedings. Any conclusion requiring an inference has been waived by the party whose case it supports by his failure to either insist on the necessary evidence in the stipulation, or by his failure to proceed to an evidentiary hearing and adduce it.

Marquette relies exclusively on those pages of the Joint Appendix for a statement of the facts.

That portion of the Secretary of Labor's brief dealing with decisions below (Pet. Brief pp. 8-12) are substantially accurate (albeit argumentatively stated) and warrant no detailed treatment herein, inasmuch as the decisions below are also contained in full text in the Joint Appendix (Jt. App. pp. 32-44 [Administrative Law Judge's Decision]; pp. 67-75 [Decision of Occupational Safety & Health Review Commission]).

II. ARGUMENT

A. The Commission was correct in denying the Secretary's request to amend its complaint after he had waived hearing in lieu of an agreed upon stipulation of facts.

The Secretary's argument that an amendment should be admitted pursuant to rule 15(b) of the Federal rules, is unsupported by cited authorities. The authorities cited deal with cases involving express consent[1] to amendment, consent to amendment implied from conduct of the objecting party *before the record was closed,* or to cases where the amended complaint recited a cause fully rebuttable by the same evidence introduced by the objecting party prior to the close of the record.

The appropriate standard for a finding of implicit consent to an amendment is found in *Moore's Federal Practice.*

> "The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment. This principle is sound, since it cannot be fairly said that there is any implied consent to try an issue where the parties do not squarely recognize it as an issue in the trial. . . ." 3. Moore's Federal Practice ¶15.13[2] p. 991-2. Accord: *Standard Title Insurance Co.* v. *Roberts,* 349 F.2d 615 (8th Cir., 1965); *Armstrong Cork Co.* v. *Lyons,* 366 F.2d 206 (8th Cir., 1966); *Wirtz* v. *Savannah Bank and Trust Company of Savannah,* 362 F.2d 857 (5th Cir., 1966) wherein

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[1] The Secretary apparently admits that there is no express consent in this case. (Brief of Petitioner, n. 15.)

a predecessor in office of the Secretary apparently urged the same construction of 15(b) as that being proposed by Respondent herein.

The Secretary's argument of implied consent is based, insofar as it relies on record evidence, upon the inclusion of numbered paragraphs 6, 7 and 9 in the joint stipulation of facts (Jt. App. pp. 7-8). Such paragraphs are an insufficient basis for finding an implicit consent under Rule 15(b) since those paragraphs are merely rhetorical recitations of the description of alleged violation contained in the original citation (Jt. App. p. 2); and because they are equally relevant whether the case was to proceed on a theory of the specific standard alleged in the complaint or on a theory of a general duty clause violation. Thus, the stipulated record contains no indication that *either party* thought they were litigating a "general duty" clause violation at the time they agreed to it. Quite the contrary, the stipulated record closed with the paragraph:

> "Wherefore, based upon the above Stipulation of Facts the parties hereto certify that *only* the following two questions remain to be decided in this proceeding:
>
> "1. Was Respondent properly cited for a serious violation of 29 C.F.R. 1926.852(a)?
>
> "2. If Respondent was properly cited, should the proposed penalty of $600 be affirmed?" (Jt. App. p. 18 (emphasis supplied)

Unable to establish an implicit consent to amendment through reference to record evidence, the Secretary turns to an argument that reasons (1) the means of abatement to remedy both the "general duty" and the specific violations are the same and, therefore (2) the Respondent is not prejudiced by an amendment. This is tantamount to

arguing that, since penalties for grand larceny and forgery are the same, a prosecutor may revise an indictment after the close of a trial. An implicit consent cannot be proven through identity of penalty, but only through the identity of proofs.

The Secretary argues that the Court should defer to the exercise of discretion of the "trial judge" under rule 15(b), and then assumes that the Administrative Law Judge is the administrative equivalent of a judge in a Federal District Court (Pet. Brief, n. 16, p. 21). The equation is not valid. The decision of the Administrative Law Judge is only a recommended decision until ratified by the Commission; he is only a fact-finding arm of the Commission; the Court of Appeals reviews only the final order of the Commission, and the Commission's findings of fact are conclusive if supported by substantial evidence.[2] *Accu-Namics, Inc.* v. *OSHRC*, 515 F.2d 828, 834.

There remains the argument of the Secretary's that the Respondent fully litigated a "general duty" violation due to the inclusion of the last two paragraphs in its brief to the Administrative Law Judge (Jt. App. p. 23-24). Presumably, had the paragraphs not been included, the Secretary would be arguing that Respondent had waived objection to amendment by not treating it in its brief. However, like the evidence relied upon by the Secretary, these paragraphs cannot be used to impute a consent to amendment because they were there for other purposes.

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[2] Tried, as it was, on a stipulated record, this case does not present the problem raised by the somewhat special deference accorded to credibility resolutions of trial examiners or administrative law judge's findings based upon his observation of witnesses. Cf. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1950).

The first paragraph was necessary, since attempts by the Secretary at post-trial amendment in previous cases were well known at the time the brief was filed. *W.B. Meredith II, Inc.*, 9 OSHRC 245, 1971-73 OSHD ¶15,280 (1972); *Mesa Fiberglass Prod. Co.*, 3 OSHRC 784, 1971-1973 OSHD ¶15,810 (1973); *Reserve Roofing and Sheet Metal, Inc.*, 4 OSHRC 552, 1973-74 OSHD ¶16,353 (1973). Accordingly, an attempt to amend in this case could reasonably be anticipated by counsel. The parties' briefs were filed concurrently, not seriatim, and since the Commission's regulations do not provide for reply briefs, failure to anticipate attempted amendment risked an unrebutted motion by the Secretary.

The second paragraph was necessary to avoid the confusion created by the Secretary's prayer for relief in his complaint (Jt. App. p. 10). At the end of the complaint—which alleged only violation of a specific standard—the Secretary requested enforcement of "the aforesaid citation," which citation alleged only a "general duty" clause violation. Thus, the Secretary's complaint left Respondent with some reasón to question the specifics of the violation, and more reason to brief all contingencies which the Secretary might raise.

The Secretary's brief in the instant case closes by requesting reversal of the Commission and an order finding Respondent in violation. However, footnote 17 subtly hints to the Court that he wouldn't be all that unhappy if the case were remanded (Pet. Brief, n. 17, p. 21). The Secretary is not entitled to a remand. The case was decided on a stipulated record, to which the Secretary agreed. Any deficiencies in that record are the fault of the Secretary; they are not grounds for finding error on the part of the Commission. A party may not allege error in the conduct

of a lower court where the conduct was agreed to or induced by him. *Lake City, Nettleton & Bay Road Improvement Dist. No. 1* v. *Luehrmann,* 113 F.2d 458 (8th Cir., 1940); *Hunter* v. *Derby Foods,* 110 F.2d 970 (2nd Cir., 1940).

B. There is substantial evidence in the record to support the Commission's finding of no violation of 29 U.S.C. 654(a)(1).

Reviewing courts are bound to apply the substantial evidence test to the Commission's findings of fact. Accordingly, if there is substantial evidence in the record to support the Commission's findings, its orders must be affirmed. *National Realty & Construction Co., Inc.* v. *OSHRC,* 489 F.2d 1257-1260, (D.C. Cir., 1973); *REA Express, Inc.* v. *Brennan,* 495 F.2d 822, 825 (2nd Cir., 1974); *Accu-Namics, Inc.* v. *OSHRC,* 515 F.2d 828, 835 (5th Cir., 1975).

The record shows, first, that the employer's overall safety and health program was generally effective and that it had never previously been cited for a violation of the Occupational Safety & Health regulations (Jt. App. 20). The Secretary cannot contest this since his case is premised on a citation which credited Respondent with these factors in assessment of penalties. One of the precautionary steps by which an employer can comply with his obligations under the Act's "general duty" clause is the maintenance of an adequate safety program. *Brennan* v. *Butler Lime and Cement Company,* 520 F.2d 1001, 1017 (7th Cir., 1975).

Furthermore, as specifically found by the Administrative Law Judge (Jt. App. 42-43) the employee in question had experienced the kiln relining procedure, which occurs

a minimum of four times annually, for 27 years when he unexplainably wandered from his assigned work station into an area where no employees had any reason to be. As noted by the U.S. Court of Appeals for the District of Columbia:

> "A hazard consisting of conduct by employees . . . cannot, however, be totally eliminated. A . . . willfully reckless employee may, on occasion, circumvent the best conceived and most vigorously enforced safety program." *National Realty and Construction Company, Inc.* v. *OSHRC,* 489 F.2d 1257, 1266 (D.C. Cir. 1973).

Generally, what the Secretary requests the court to do in order to find a violation of 654(a)(1) is the same as that requested by the Commission before the Court of Appeals for the District of Columbia in *National Realty and Construction Company* v. *OSHRC, supra.* In response, that Court stated:

> "The Commission sought to cure these deficiencies *sua sponte* by speculating about what National Realty could have done to upgrade its safety program. These suggestions, while not unattractive, came too late in the proceedings. An employer is unfairly deprived of an opportunity to cross-examine or to present rebuttal evidence and testimony when it learns the exact nature of its alleged violation only after the hearing. As noted above, the Secretary has considerable scope before and during a heaaring to alter his pleadings and legal theories. But the Commission cannot make these alterations itself in the face of an empty record. To merit judicial deference, the Commission's expertise must operate upon, not seek to replace, record evidence." *National Realty and Construction Co., Inc.* v. *OSHRC,* 489 F.2d at 1267.

The Secretary attempts to fill in the voids in his case by inference from circumstantial evidence, and by arguing that clearly relevant and material issues need not be proven, specifically attempting to invoke the Common Law doctrine of *res ipsa loquitur* (Pet. Brief p. 30). However, an element necessary to a *res ipsa* case is elimination of the possibility of negligence on the part of the injured party. Prosser, *Law of Torts,* 4th Ed., 1972, p. 214. Not only has this element not been proven, but its opposite—that the employee was unaccountably absent from his assigned work station—has been stipulated.[3]

In a similar attempt to reduce his burden the Secretary places great reliance on *Brennan* v. *OSHRC (Underhill),* 513 F.2d 1032 (2nd Cir., 1975). Reliance on *Underhill* is for the proposition that "exposure" of employees to a hazard need not be proven, but only "access." The reliance is misplaced. *Underhill* dealt with a violation of a specific standard promulgated under §654(a)(2). This court specifically distinguished such a case from one in §654(a)(1), the "general duty" standard (513 F.2d at 1038) which required proof the injury-causing hazard be generally recognized in the industry in question. See Morey, The General Duty Clause of the Occupational Safety and Health

[3] Professor Prosser seriously questions the usefulness of *res ipsa* in common law negligence actions *Op.Cit.,* P. 215. While its suggestion is a novel attempt at circumventing the burden of proof required by the Secretary of Labor, its injection into the statutory scheme is unwarranted, given the extremely broad investigatory powers enjoyed by the Secretary under the Act. It is inconceivable that a reasonably diligent administrator could not prepare a successful case for litigation through utilization of such procedures, without the benefit of evidentiary presumptions, assuming that the case had any merit to begin with.

Act of 1970, 86 Harv. L. Rev., 988, 1000-1001, cited with approval in *REA Express* v. *Brennan, supra* at 825.

C. If permitted, the tactics used by the Secretary in this case could virtually guarantee him victory in every case.

If the Secretary is successful in his attempt to amend (treated under §A, *supra*) and his attempt to invoke evidentiary presumptions (treated in §B, *supra*), he could follow the same procedure in every case and never fear losing. The employment of such a tactic would proceed as follows:

1. The Secretary files a complaint alleging the violation of a specific standard.

2. The circumstances surrounding the injury in question are introduced as being relevant, which they clearly would be.

3. While negotiating a stipulation of fact, and/or litigating in an administrative hearing, he successfully avoids the Respondent's introduction of evidence of general duty clause compliance as being not relevant, which it clearly would not be. Also, he introduces no direct evidence of general duty violation beyond that described in step 2 above.

4. After the record is closed, the Secretary changes his theory to a "general duty" violation based upon proof of a common law violation through circumstantial evidence.

Thus—assuming that the general duty violation can be proven through such circumstantial evidence—the Secretary can always create a situation where he has proved a general duty violation and the Respondent has had no

rebuttal opportunity. This case dramatically illustrates the inherent unfairness of such a procedure. In this case the Secretary (1) began by citing a general duty violation, (2) switched to a specific standard violation until the stipulation was signed and the record closed, and (3) reverted to a general duty violation through an amendment under Rule 15(b). Whether or not it was a deliberate attempt at manipulation of the record, it effectively denied Respondent of an opportunity to fully develop a record. In any event, if such a tactic should receive the sanction of this Court, there is nothing to prevent its utilization in every case.

III. CONCLUSION

On the basis of the foregoing and the record as a whole, Respondent respectfully requests that the appeal be dismissed.

Respectfully submitted,

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